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SHUTTERSTOCK, INC. and

VOLLEYPOST

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL GRECCO PRODUCTIONS,
INC., a California corporation,

Plaintiff,

vs.

SHUTTERSTOCK, INC., a Delaware
corporation; **KOBERT MEDIA,** an
unknown entity, dba **VOLLEYPOST;**
and **DOES 1-10,** inclusive,

Defendants.

Case No. **2:19-cv-01153 DMG AFM(x)**

ANSWER OF DEFENDANTS
SHUTTERSTOCK, INC. AND
VOLLEYPOST TO COMPLAINT

Assigned to the Hon. Dolly M. Gee

Action Filed: February 14, 2019

1 Defendant Shutterstock, Inc. (“Shutterstock”) and Defendant Kobert
 2 Advanced Media Ltd. an entity doing business as Volleypost (erroneously sued as
 3 “Kobert Media dba Volleypost”) (“Volleypost”) (collectively “Defendants”) answer
 4 the corresponding paragraphs of the Complaint of Plaintiff Michael Grecco
 5 Productions, Inc. (“Plaintiff”) as follows:

6 Defendants deny, generally and specifically, each and every allegation
 7 contained in the Complaint, except those specifically admitted, and deny that
 8 Plaintiff is entitled to any relief.

9 JURISDICTION AND VENUE

10 1. This paragraph states the nature of Plaintiff’s Complaint and no
 11 response is required. Defendants deny that Plaintiff is entitled to any relief.

12 2. This paragraph contains arguments and legal conclusions to which no
 13 response is required. To the extent a response is required, Defendants deny the
 14 allegations in this paragraph.

15 3. This paragraph contains arguments and legal conclusions to which no
 16 response is required. To the extent a response is required, Defendants deny the
 17 allegations in this paragraph.

18 PARTIES

19 4. Defendants lack knowledge or information sufficient to form a belief
 20 as to the truth of the allegations in this paragraph, and on that basis, deny them.

21 5. Defendants admit the allegations in this paragraph.

22 6. Defendants admit that Kobert Advanced Media Ltd. does business as
 23 Volleypost, and that it operates the website “www.volleypost.com.” Except as
 24 specifically admitted, Defendants deny the remainder of this paragraph.

25 7. This paragraph contains arguments and legal conclusions to which no
 26 response is required. To the extent a response is required, Defendants deny the
 27 allegations in this paragraph.

28 ///

STATEMENT OF FACTS

Plaintiff's Business and the Photograph Forming the Subject Matter of This Dispute.

8. Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and on that basis, deny them.

9. Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and on that basis, deny them.

10. Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and on that basis, deny them.

11. Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, including whether the document attached as Exhibit A is authentic, and on that basis, deny them.

12. Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, and on that basis, deny them.

The Defendants and the Marketplace.

13. Defendants admit that Shutterstock operates a website at <https://www.shutterstock.com>, and that Volleypost operates websites at <http://www.kobertmedia.com> and <https://www.volleypost.com>. The content of these websites speaks for itself. The remainder of this paragraph contains arguments and conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in this paragraph.

14. Defendants admit that the e-mail from Ayal Ebert attached as Exhibit C substantially depicts a communication from Mr. Ebert to Plaintiff, and speaks for itself. Defendants further admit that Shutterstock is a leading global technology company offering a creative platform for high-quality assets, that Shutterstock licenses images, video, music, editorial assets, and custom content, and that Shutterstock's brands include Bigstock, Offset, PremiumBeat, Rex Features, and Shutterstock Custom. The remainder of this paragraph contains arguments and

1 legal conclusions to which no response is required. To the extent a response is
2 required, Defendants deny the remaining allegations in this paragraph.

3 15. Defendants admit that the quarterly financial report attached as Exhibit
4 D is a true and correct copy of the financial report as available on PRNewswire, and
5 speaks for itself. The remainder of this paragraph contains arguments and legal
6 conclusions to which no response is required. To the extent a response is required,
7 Defendants deny the remaining allegations in this paragraph.

8 16. Defendants admit that the screenshots of Shutterstock and Kobert
9 Media “about us” webpages attached as Exhibit E are true and correct copies of the
10 webpages they depict, and speak for themselves. The remainder of this paragraph
11 contains arguments and legal conclusions to which no response is required. To the
12 extent a response is required, Defendants deny the remaining allegations in this
13 paragraph.

14 17. Defendants admit that the Volleypost Terms and Conditions,
15 Shutterstock Policies, and Shutterstock Terms of Service attached as Exhibit F are
16 true and correct copies of the webpages they depict, and speak for themselves. The
17 remainder of this paragraph contains arguments and legal conclusions to which no
18 response is required. To the extent a response is required, Defendants deny the
19 remaining allegations in this paragraph.

20 18. This paragraph contains arguments and legal conclusions to which no
21 response is required. To the extent a response is required, Defendants deny the
22 allegations in this paragraph.

23 19. Defendants admit that the screenshot of the Volleypost article “Evan
24 Spiegel’s Net Worth: Everything to Know” attached as Exhibit G is a true and
25 correct copy of the webpage it depicts, and speaks for itself. Defendants admit that
26 Volleypost downloaded the Snapchat Photo from Shutterstock pursuant to
27 Volleypost’s license agreement with Shutterstock. The remainder of this paragraph
28 contains arguments and legal conclusions to which no response is required. To the

1 extent a response is required, Defendants deny the remaining allegations in this
2 paragraph.

3 20. Defendants admit that Plaintiff has never sold nor licensed the
4 Snapchat Photo to Shutterstock. Defendants lack knowledge or information
5 sufficient to form a belief as to the truth of the paragraph's allegations concerning
6 Plaintiff's licensing practices as to others. The remainder of this paragraph contains
7 arguments and legal conclusions to which no response is required. To the extent a
8 response is required, Defendants deny the remaining allegations in this paragraph.

9 21. Defendants lack knowledge or information sufficient to form a belief
10 as to the truth of the paragraph's allegations concerning Plaintiff's licensing
11 practices as to others. The remainder of this paragraph contains arguments and
12 conclusions to which no response is required. To the extent a response is required,
13 Defendants deny the allegations in this paragraph.

14 22. Defendants lack knowledge or information sufficient to form a belief
15 as to the truth of the paragraph's allegations concerning the availability of images
16 on Google or the internet. The remainder of this paragraph contains arguments and
17 conclusions to which no response is required. To the extent a response is required,
18 Defendants deny the allegations in this paragraph.

19 23. This paragraph contains arguments and legal conclusions to which no
20 response is required. To the extent a response is required, Defendants deny the
21 allegations in this paragraph.

22 **FIRST CLAIM FOR RELIEF**

23 **(Copyright Infringement, 17 U.S.C. § 501, Against All Defendants)**

24 24. Defendants reincorporate their responses to the allegations contained in
25 the above paragraphs as if fully stated here.

26 25. This paragraph contains arguments and legal conclusions to which no
27 response is required. To the extent a response is required, Defendants deny the
28 allegations in this paragraph.

1 26. This paragraph contains arguments and legal conclusions to which no
2 response is required. To the extent a response is required, Defendants deny the
3 allegations in this paragraph.

4 27. This paragraph contains arguments and legal conclusions to which no
5 response is required. To the extent a response is required, Defendants deny the
6 allegations in this paragraph.

7 28. This paragraph contains arguments and legal conclusions to which no
8 response is required. To the extent a response is required, Defendants deny the
9 allegations in this paragraph.

10 29. This paragraph contains arguments and legal conclusions to which no
11 response is required. To the extent a response is required, Defendants deny the
12 allegations in this paragraph.

13 30. This paragraph contains arguments and legal conclusions to which no
14 response is required. To the extent a response is required, Defendants deny the
15 allegations in this paragraph.

16 31. This paragraph contains arguments and legal conclusions to which no
17 response is required. To the extent a response is required, Defendants deny the
18 allegations in this paragraph.

19 32. This paragraph contains arguments and legal conclusions to which no
20 response is required. To the extent a response is required, Defendants deny the
21 allegations in this paragraph.

22 33. This paragraph contains arguments and legal conclusions to which no
23 response is required. To the extent a response is required, Defendants deny the
24 allegations in this paragraph.

25 34. This paragraph contains arguments and legal conclusions to which no
26 response is required. To the extent a response is required, Defendants deny the
27 allegations in this paragraph.

28 35. This paragraph contains arguments and legal conclusions to which no

1 response is required. To the extent a response is required, Defendants deny the
2 allegations in this paragraph.

3 36. This paragraph contains arguments and legal conclusions to which no
4 response is required. To the extent a response is required, Defendants deny the
5 allegations in this paragraph.

6 37. This paragraph contains arguments and legal conclusions to which no
7 response is required. To the extent a response is required, Defendants deny the
8 allegations in this paragraph.

9 **SECOND CLAIM FOR RELIEF**

10 **(Negligence Against Defendant Shutterstock)**

11 38. Defendants reincorporate their responses to the allegations contained in
12 the above paragraphs as if fully stated here.

13 39. This paragraph contains arguments and legal conclusions to which no
14 response is required. To the extent a response is required, Defendants deny the
15 allegations in this paragraph.

16 40. This paragraph contains arguments and legal conclusions to which no
17 response is required. To the extent a response is required, Defendants deny the
18 allegations in this paragraph.

19 **PRAYER**

20 Defendants deny that Plaintiff is entitled to any of the requested relief;
21 specifically:

22 1. Defendants deny that Plaintiff is entitled to the injunctive relief
23 requested.

24 2. Defendants deny that Plaintiff is entitled to the statutory damages
25 requested, nor the requested costs, interest, or attorneys' fees under the Copyright
26 Act.

27 3. Defendants deny that Plaintiff is entitled to the accounting requested.

28 4. Defendants deny that Plaintiff is entitled to the requested disgorgement

1 of profits, reimbursement, or to any damages whatsoever.

2 5. Defendants deny that Plaintiff is entitled to the requested damages.

3 6. Defendants deny that Plaintiff is entitled to any other further relief.

4 **AFFIRMATIVE DEFENSES**

5 Defendants allege the following affirmative defenses. By alleging these
6 affirmative defenses, Defendants do not in any way concede that they, or any of
7 them, bear the burden of proof or persuasion on any of these issues. Defendants
8 reserve the right to supplement, amend, or modify these affirmative defenses, as
9 appropriate, based on information obtained during the course of this litigation.

10 **FIRST SEPARATE AND ADDITIONAL DEFENSE**

11 Plaintiff's Complaint and each claim asserted therein fails to state facts
12 sufficient to constitute a cause of action against Defendants.

13 **SECOND SEPARATE AND ADDITIONAL DEFENSE**

14 Plaintiff's Complaint and each of its causes of action arise from Defendants'
15 exercise of their rights of free speech, or acts in furtherance of that right, in
16 connection with an issue of public interest, and thus falls within the scope of
17 California Code of Civil Procedure § 425.16. Because Plaintiff cannot establish a
18 probability that he will prevail on any of his causes of action, each cause of action
19 must be stricken, and Defendants must be awarded their attorneys' fees and costs
20 incurred in defending this action.

21 **THIRD SEPARATE AND ADDITIONAL DEFENSE**

22 Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean
23 hands.

24 **FOURTH SEPARATE AND ADDITIONAL DEFENSE**

25 Plaintiff's claims are barred, in whole or in part, by the equitable doctrine of
26 laches.

27 **FIFTH SEPARATE AND ADDITIONAL DEFENSE**

28 Plaintiff's claims are barred by the doctrines of waiver and/or estoppel.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations, specifically including but not limited to the provisions of California Code of Civil Procedure §§ 338 and 339, and 17 USC § 507.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, to the extent that they arise from conduct not attributable to Defendants.

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, because Defendants acted in good faith.

NINTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, because Defendants reasonably relied on a third party's representation and warranty of ownership and conveyance of all applicable rights to the allegedly infringing work.

TENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, because the conduct of one defendant is not imputed to or binding on any other defendant.

ELEVENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred by the doctrine of Fair Use enshrined at 17 U.S.C. § 107.

TWELFTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred by the doctrine of Copyright Misuse.

THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred by the "safe harbor" provided by the Digital Millennium Copyright Act, 17 U.S.C. §§ 512 *et seq.*

FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's negligence claim is barred, in whole or in part, because Defendants owed no duty to Plaintiffs.

FIFTEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's negligence claim is preempted by the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

SIXTEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's negligence claim is barred, in whole or in part, because Defendants have not acted with the requisite degree of fault and/or knowledge.

SEVENTEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff is not entitled to injunctive or any other equitable relief because any alleged injury is not immediate or irreparable, and Plaintiff has an adequate remedy at law.

EIGHTEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff is not entitled to recover Defendants' profits, if any, because any such profits are not attributable to any alleged infringement.

NINETEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's damages, if any, are limited by the absence of any willful infringement by Defendants, and each of them.

TWENTIETH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's damages, if any, are limited by Defendants' innocent intent.

TWENTY-FIRST SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims for statutory damages and attorney's fees are barred, in whole or in part, by the Copyright Act, 17 U.S.C. § 412.

TWENTY-SECOND SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, to the extent any copyright registration asserted by Plaintiff as covering the allegedly infringed work is invalid and/or unenforceable.

TWENTY-THIRD SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claim is barred to the extent it seeks statutory damages that, when measured against the actual damage, if any, suffered by Plaintiff, would be

1 excessive, obviously unreasonable and wholly disproportionate in violation of the
2 Due Process clause.

3 **TWENTY-FOURTH SEPARATE AND ADDITIONAL DEFENSE**

4 Plaintiff's claims are barred, in whole or in part, because any damages it
5 purportedly suffered were not proximately caused by Defendants.

6 **TWENTY-FIFTH SEPARATE AND ADDITIONAL DEFENSE**

7 Plaintiff's claims are barred, in whole or in part, because it failed to mitigate
8 its alleged damages.

9 **TWENTY-SIXTH SEPARATE AND ADDITIONAL DEFENSE**

10 Plaintiff's claims are barred, in whole or in part, because its alleged damages
11 are vague, uncertain, imaginary, and speculative.

12 **TWENTY-SEVENTH SEPARATE AND ADDITIONAL DEFENSE**

13 Defendants may have additional, as yet unstated, separate defenses available
14 to them. Defendants each reserve their right to assert additional separate defenses
15 in the event discovery indicates that such defenses would be appropriate.
16 Defendants further reserve the right to supplement, amend, or modify each of their
17 separate and additional defenses, as appropriate, based on information obtained
18 during the course of this litigation.

19 **PRAYER**

20 Defendants respectfully request that the Complaint be dismissed with
21 prejudice and that they be awarded costs, including reasonable attorneys' fees along
22 with such other and further relief as the Court may deem just and proper.

23 DATED: June 17, 2019

DAVIS WRIGHT TREMAINE LLP
SCOTT R. COMMERSON
BRENDAN N. CHARNEY

26 By: /s/ Scott R. Commerson

27 Scott R. Commerson
Attorneys for Defendants
SHUTTERSTOCK, INC. and
28 VOLLEYPOST